84-1432

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. 85-

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

WILLIAM J. MARTIN,
PETITIONER,

v.

DIGHT W. CRAIN, PETER H. GARLAND,
J. VINCENT SAUNDERS, MARSHALL LEBOWITZ,
MARK H. RAIDER, PAUL AMBLER,
AND PAMELA J. KAUFMAN, AS THEY ARE
MEMBERS OF THE NATICK SCHOOL COMMITTEE
AND JOSEPH A. KEEFE, SUPERINTENDENT
OF SCHOOLS OF THE TOWN OF NATICK,
RESPONDENTS.

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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53P

Questions Presented.

I. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts is in conflict with applicable decisions of the Supreme Court when the state court upheld as constitutional on its face that portion of M.G.L. c. 71, § 42D, which permits school officials to suspend a tenured public school teacher for five days without notice, hearing or any other procedures.

II. Whether the Supreme Judicial Court erred in finding that the petitioner Martin received a post-termination hearing on his five-day suspension and that, thus § 42D was constitutional as applied in this case.

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WILLIAM J. MARTIN,
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DIGHT W. CRAIN, PETER H. GARLAND,
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AND JOSEPH A. KEEFE, SUPERINTENDENT
OF SCHOOLS OF THE TOWN OF NATICK,
RESPONDENTS.

Petition for Writ of Certiorari
to the Supreme Judicial Court
for the Commonwealth of Massachusetts.

The petitioners respectfully pray that a writ of certiorari issue to review the decree and opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts entered on the proceeding on December 10, 1984.

Opinions Below.

The opinion of the Supreme Judicial Court of Massachusetts is reported at 393 Mass. 430 (1984) and is reproduced at page 2a of the appendix. The opinion of the trial court is not reported but is reproduced at page 10a of the appendix.

Jurisdiction.

The decree of the Supreme Judicial Court of the Commonwealth of Massachusetts was entered on December 10, 1984. This petition is being filed within ninety days of December 10, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions.

Constitution of the United States, Amendment XIV, Due Process Clause:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law;
>
> State Statutes: M.G.L. c. 71, §§ 42 and 42D (A. 29a, 32a); M.G.L. c. 71, § 43A (A. 33a); Ala. Code § 36-26-38.

Statement of the Case.

William Martin, the petitioner, was employed as an elementary school teacher in Natick for twenty-four (24) years. He was a tenured teacher at all times material to this case.

On or about January 15, 1980, Martin filed a grievance with the Natick Teachers Association charging that his principal, John Crisafulli had, without cause, requested that he resign from his position as a school teacher in the town of Natick. The grievance also alleged that, because Martin failed to comply, Crisafulli began, on a daily basis, to harass and criticize him personally in his classroom. On January 18, 1980, the Superintendent of the Natick Schools, Joseph A. Keefe, after learning of the grievance against Mr. Crisafulli, called Martin to Keefe's office and advised him that he should resign his position as a school teacher in the town of Natick. At the January 18 meeting, Mr. Martin was accompanied by counsel. At that meeting on January 18, Mr. Martin was asked to resign. He was told that he had until Monday, January 21, 1980 to decide whether or not he wanted to resign. At no time during that meeting was he informed of any intention on the part of the Superintendent to suspend him or was he informed of the activity that was supposed to be the reason for the suggested resignation. On January 21, 1980, Martin, accompanied by counsel, once again appeared in the office of Superintendent Keefe. At that time, Dr. Keefe inquired as to whether Mr. Martin would resign from the Natick School System and Mr. Martin said that he would not. During the meeting, no charges were advanced by Keefe against the petitioner regarding his function as a teacher. Yet, Dr. Keefe notified Martin and his attorney that the Superintendent would suspend Martin for five days. On the same day, Keefe sent Martin a letter informing him simply that "I hereby notify you that I have suspended you for the week of January 21-25, 1980". No reasons were

advanced for this suspension. Mr. Martin was not informed in this January 21, 1980 letter as to what he was accused of to warrant the suspension nor was he informed as to the basis of any accusations. On that same day, Keefe sent Martin a second letter informing him that Keefe intended to recommend an additional suspension to the School Committee ("Committee") at its regular meeting on January 29, 1980 for "unbecoming conduct or other good cause". On that day as well, a letter was also sent from Martin's attorney to the Chairman of the Committee. In this letter, the petitioner's attorney asked the Committee for the details and specifications of the "charge or charges against Martin and the cause or causes for which the (five-day) suspension was imposed." A copy was sent to the Superintendent of Schools, Joseph A. Keefe. On January 24, 1980, Keefe responded to the January 21 letter from the attorney, by quoting the reasons, not for the five-day suspension, but rather for the causes upon which the anticipated suspension would be heard on January 29, 1980. The January 24, 1980 letter notified Martin as to three areas upon which Keefe would recommend Martin's suspension: grading students lower than they should be graded; inefficiency in teaching as reflected by three years' evaluations; incapacity as a teacher as reflected in three years' evaluations. Martin's attorney, by letter dated January 25, 1980 requested a hearing regarding the five-day suspension and on the future suspension anticipated by the Superintendent.

On January 28 and 29, Martin was placed on a paid leave of absence. On January 29, the day of the hearing, Martin's attorney again asked in writing for the reasons for the five-day suspension. The Committee did not respond to these requests. In the hearing, when the petitioner's attorney asked the Chairman of the Committee, Mr. Crain, if Martin was going to receive a hearing on the five-day suspension previously imposed, Chairman Crain answered "Not tonight" (A. 27a). The

hearing on the additional suspension contemplated by the Superintendent's January 24 letter, was conducted on the evenings of January 29 and 30, 1980. The Committee voted to suspend Martin for thirty (30) days for the reasons set forth in the January 24, 1980 notice.

The petitioner filed a complaint in the Superior Court of the Commonwealth seeking, *inter alia*, declaratory relief relative to the five-day suspension alleging that he had been deprived of Due Process. After a hearing on defendants' motion for summary judgment, the Superior Court judge held that the portion of M.G.L. c. 71, § 42D which allowed for the five-day suspension of a tenured teacher without procedures was unconstitutional (A. 10a).

The Supreme Judicial Court accepted direct appellate review of the matter. It held that the Massachusetts suspension statute is constitutional in spite of the fact that it provides no procedures in connection with the five-day suspension of a tenured teacher (A. 7a). The Supreme Judicial Court also held that because Martin was subsequently given a hearing on his thirty (30) day suspension, that the question of whether § 42D implicates a requirement for disclosure of the reasons for the five-day suspension did not need to be addressed (A. 6a, 7a).

Reasons for Granting the Writ.

I. The Decision of the Supreme Judicial Court for the Commonwealth of Massachusetts Is In Conflict with the Applicable Decisions of the Supreme Court in Upholding that Portion of M.G.L. c. 71, § 42D Which Permits the Suspension of a Tenured School Teacher for Five Days Without Any Due Process Procedures.

The petitioner argued below that because he cannot be terminated except upon good cause, that he has a "property interest" in continuous, uninterrupted employment and, further, that he is guaranteed by the Due Process Clause, Amendment XIV of the Constitution of the United States, to certain procedures in connection with the removal of that property interest. The Supreme Judicial Court held that the Massachusetts suspension statute, M.G.L. c. 71, § 42D, is constitutional in spite of the fact that it provides no procedures whatsoever in connection with the five-day suspension of a tenured teacher. This judgment is not in conformity with the principles advanced by this Court. See *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Goss* v. *Lopez*, 419 U.S. 565 (1975). See also, *Best* v. *Boswell*, 696 F.2d 1282 (11th Cir. 1983).

A. *Section 42D is Unconstitutional on its Face.*

As regards the first issue raised in this petition, it is submitted that § 42D is unconstitutional on its face. The petitioner is a tenured teacher in the Commonwealth and, thus, his employment cannot be terminated except upon "good cause". M.G.L. c. 71, § 42 (A. 29a). In *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) a majority of the Justices of this Court held that once a Legislature insists a public employee may not be dismissed

except upon "cause", that said employee is entitled to a hearing to prove "cause". *Cf., Board of Regents* v. *Roth*, 408 U.S. 564, 570 (1974).

As Justice Powell asserted in a concurring opinion in *Arnett*:

> The right (to procedural due process) is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.

416 U.S. at 167.

While Justice Rehnquist, writing for a plurality of this Court, concluded in *Arnett, supra*, that the procedures or lack of them, by which "cause" is to be determined limits the employee's property interest, subsequent Supreme Court decisions dispute this limitation on Due Process. In *Goss* v. *Lopez*, 419 U.S. 565 (1975), the Court held that a state-guaranteed right to education constituted a property interest adequate to warrant due process in connection with a ten-day suspension of a student. In citing examples of various property interests recognized by the Supreme Court, Justice White observed:

> Accordingly, a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process.

419 U.S. at 573.

Thus, *Goss* endorses the theory that once the state provides that an employee cannot be removed unless "cause" is demonstrated, the sovereign is compelled by the federal constitution to provide some due process procedures. Moreover, *Goss* provides that in most cases, Due Process requires at least a rudimentary, pre-deprivation hearing and notice unless emergency requires immediate removal. In that event, post-deprivation procedures would suffice, see *Goss*, 419 U.S. at 582; *accord, Arnett* v. *Kennedy*, 416 U.S. at 194 (White, concurring opinion).

In the case sub judice, because the petitioner cannot be terminated except upon "good cause" he has a property interest in stable, continued employment with the Natick School Department absent certain constitutionally-guaranteed due process procedures. To assert, as the Supreme Judicial Court does (A. 6a), that the petitioner has no property interest in the five days he was suspended because no procedures are included in the statute in connection with such a suspension, misapprehends Supreme Court precedent. The *Goss* Court was emphatic, that once a property interest is created, it cannot be removed completely or "in chunks":

> A short suspension is, of course, a far milder deprivation than expulsion. But, "education is perhaps the most important function of state and local governments," . . . and the total exclusion from the educational process for more than a trivial period . . . is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.

419 U.S. 576 (citations omitted).

Because Martin has a property interest in continued employment, the loss of five days' work or several hundred dollars' salary is not so trivial that it may be arbitrarily removed. The only inquiry is into the extent of the procedures applied in light of the "weight" of the property interest balanced against the interest of the employer. *Goss* v. *Lopez*, 419 U.S. at 576; *Arnett* v. *Kennedy*, 416 U.S. at 194 (White, concurring opinion).

Similarly, the Eleventh Circuit has struck down as unconstitutional an Alabama statute which allowed the "preemptory" suspension of a permanent, merit system employee without the benefit of notice or hearing. In *Best* v. *Boswell*, 696 F.2d 1282 (11th Cir. 1983) the Court, approving the district court's reliance on *Goss*, held:

> The Alabama Code invests state merit system employees with a protected property interest. Thus, before that interest can be suspended, employees "must be given *some* kind of notice and afforded *some* kind of hearing." . . . We need not decide the nature of the opportunity to be heard which should be provided . . . but only agree with the district court's conclusion that the statute's unequivocal statement "without the right to a hearing"[1] is unconstitutional."

696 F.2d at 1290.

Decisions in the Commonwealth also support the proposition that a tenured teacher may not be deprived of part of his property interest without cause even though M.G.L. c. 71, § 42

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[1] An appointing authority may, from time to time, preemptorily suspend any employee without pay or other compensation and without the right of a hearing as punishment for improper behavior, but such suspension . . . shall not exceed 30 days. Alabama Code Section 36-26-28.

does not provide specific procedures for such partial taking. See *Setterlund* v. *Groton-Dunstable Regional School Committee*, 382 Mass. 328 (1981) where the Supreme Judicial Court held that the reduction of a tenured teacher to half-time was adequate to warrant the right to appeal to Superior Court pursuant to the Tenure Law's appeal procedure to ascertain the adequacy of "cause". Stated the Court:

> The tenure provisions . . . were intended to protect experienced and veteran teachers against capricious, fickle and irregular exploits of school boards. . . . And limiting the application of "removed" or "dismissed" to instances of complete termination would — as a practical matter — totally obliterate the protection intended by the statute. If this were the case, a board could nibble away and reduce one's employment until economic necessity forced the tenured teacher to resign.

382 Mass. at 331-332.

The Supreme Judicial Court's reliance upon *Milne* v. *School Committee of Manchester*, 381 Mass. 581 (1980)[2] and *Boston Teachers Union, Local 66* v. *School Committee of Boston*, 386 Mass. 197 (1982) is misplaced (A. 7a). Neither case addressed the issue of what predeprivation procedures are required in order to establish whether substantive "cause" exists. Rather, the court determined, that in the limited situations of declining enrollment (*Milne*) or budgetary restaints (*Boston*

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[2] *Bishop* v. *Wood*, 426 U.S. 341 (1976) which was cited by the Supreme Judicial Court in *Milne* is not instructive in this case which involves a teacher who has a property interest in continued employment due to the fact he may only be dismissed upon "cause". In *Bishop*, the Supreme Court found that the North Carolina District Court had interpreted the law as omitting a "cause" requirement relative to the dismissal of a public employee, thus no property interest in uninterrupted employment attached.

Teachers Union) substantive, good "cause" exists as a matter of law. Moreover, it is erroneous to assert that the teacher in the budgetary crisis or declining enrollment situation is given no procedure whatsoever. The teacher has the right to a full, evidentiary hearing guaranteed by the M.G.L. c. 71, § 43A (A. 33a) where she/he claims the reasons advanced are a "sham" or "subterfuge", *Boston Teachers Union*, 386 Mass. at 216.

In the instant case, no specific situations that could give rise to the substantive concepts of the "unbecoming conduct" or "any other cause" described in § 42D have yet been identified as a matter of law. Even if they were, however, because such situations relate specifically to teacher conduct, about which he has knowledge and over which he has control unlike declining enrollment, it is productive to give the teacher an opportunity to deny the charged conduct.

B. *Section 42D is Unconstitutional as it Was Applied to Martin Because the Reasons for his Five-Day Suspension Were Never Disclosed to Him by a Post-Deprivation Hearing or by Any Other Means.*

Despite his requests, Martin was not given a hearing on his five-day suspension. The Supreme Judicial Court misreads the record in its assertion that the subsequent hearing on January 29, 1980 relative to the thirty-day suspension would satisfy a requirement for a hearing on the short suspension. This is because the Committee specifically refused to provide him with a hearing on January 29 for the unstated charges relative to the five-day suspension (A. 27a). Moreover, nowhere else in the record is there any evidence that, despite the repeated written requests of his attorney, that Martin was ever given a hint at the conduct in which he engaged that was unacceptable enough to warrant a five-day suspension. The meetings of

January 18 and 21 were not instructive as to the reason for his suspension. Quite the contrary, as opposed to constituting the rudimentary prior notice and hearing required by *Goss*, there is no dispute that the only communication forthcoming from the Superintendent at those meetings was a demand that Martin resign. That Martin was accompanied by an attorney at both meetings does not elevate the meetings to the process due to Mr. Martin. It is again not disputed that the Superintendent refused to provide the attorney with any information that would serve as notice of the complaint the school had against Martin, much less provide him with a hearing.

Ironically in this regard, the Supreme Judicial Court concludes that because there is nothing in the record that shows that the reasons for the thirty-day suspension which were advanced at the January 30, 1980 hearing are any different than the unstated reasons for the five-day suspension, that the petitioner's Due Process rights were intact (A. 6a). A statute must be construed in a way so as to render it constitutional. *Commonwealth* v. *King*, 374 Mass. 5 (1977). If the Supreme Judicial Court's conjecture as to reasons for the short suspension were proven by the record, it would be fatal to any hope of constitutional application of § 42D. This is so because the only constitutional construction of this section that would allow the Committee to summarily remove the teacher would be where the teacher is so dangerous or disruptive that he needs to be kept away from impressionable students. *Cf.*, *Goss*, 419 U.S. at 582. In such a situation, abbreviated procedures or post-deprivation procedures may be constitutionally justified. There is no constitutional justification for preemptory removal of a tenured teacher with no procedure at all for alleged poor teaching technique.

In light of the fact that the last paragraph of § 42D contemplates behavior that could be dangerous, it is conceded that in certain, limited cases, a hearing could follow suspension.

419 U.S. at 582. However, it is submitted that pre-deprivation procedure is required in Martin's case because there appears nothing on the record to indicate that Martin was "dangerous", *Goss*, 419 U.S. at 582. Such procedures would have given him an opportunity to meet and dispel the stigma of "unbecoming conduct" which is now dogging Martin in his personnel record.

Conclusion.

In light of the foregoing, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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On the Brief:
SANDRA C. QUINN

Appendix.

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, December 10, 1984.

IN THE CASE NO. SJC — 3434

WILLIAM J. MARTIN

vs.

SCHOOL COMMITTEE OF NATICK & another
pending in the Superior Court Department of the Trial Court for the County of Middlesex No. 80-1075

ORDERED, that the following entry be made in the docket; viz., —

The judgment of the Superior Court is reversed in so far as it was granted in favor of the plaintiff with respect to the five-day suspension. Judgment for the defendants is to be entered. The judgment in favor of the defendants with respect to the thirty-day suspension is affirmed.

BY THE COURT,

/s/ Jean M. Kennett, CLERK.

December 10, 1984
See opinion on file.
A TRUE COPY
ATTEST: /s/ _____ March 5, 1985
Frederick J. Quinlan, Asst. Clerk
Supreme Judicial Court for the Commonwealth

WILLIAM J. MARTIN *vs.* SCHOOL COMMITTEE OF NATICK & another.[1]

Middlesex. September 12, 1984. — December 10, 1984.

Present: WILKINS, LIACOS, NOLAN, LYNCH, & O'CONNOR, JJ.

Due Process of Law, Suspension of teacher, Notice, Hearing. *School and School Committee*, Suspension of teacher.

The summary five-day suspension provision of G. L. c. 71, § 42D, was not unconstitutional as applied to a tenured teacher suspended for five days by the superintendent of schools, where the teacher was subsequently given a hearing preceding an additional thirty-day suspension by the school committee and where the record, which disclosed the reasons for the thirty-day suspension, gave no indication that they differed from the reasons for the five-day suspension. [ ]

In an action by a tenured school teacher challenging the legality of a summary five-day suspension by the superintendent of schools and a second, thirty-day, suspension by the school committee following notice and hearing, there was no merit to the plaintiff's contention that the notice he received before the hearing on the second suspension was deficient because it did not specifically advise him that a second suspension was to be considered and did not specify the length of the proposed suspension. [ ]

In the circumstances, a school committee conducting a hearing on charges against a tenured teacher was not arbitrary or capricious in denying a request for a continuance made by the teacher's attorney about 1 A.M. on the second night of the hearing when the attorney informed the chairman of the committee that he was too tired to continue. [ ]

On appeal by a tenured teacher challenging the validity of a thirty-day suspension, this court did not consider whether there was sufficient evidence before the school committee to substantiate the charges against the teacher, where the record on appeal contained only a few excerpts from the transcript of the hearing before the school committee. [ ]

[1] The superintendent of schools of Natick. We acknowledge the amicus briefs filed by the Attorney General, the Massachusetts Teachers Association, the Massachusetts Association of School Superintendents, Inc., and the Massachusetts Association of School Committees, Inc.

CIVIL ACTION commenced in the Superior Court Department on February 29, 1980.

The case was heard by *Paul G. Garrity*, J., on a motion for summary judgment.

The Supreme Judicial Court granted a request for direct appellate review.

Brian T. Kenner (*Deborah S. Russo* with him) for the defendants.

Charles M. MacLean for the plaintiff.

Sandra C. Quinn, for Massachusetts Teachers Association, amicus curiae, submitted a brief.

Austin Broadhurst, for Massachusetts Association of School Committees, Inc., amicus curiae, submitted a brief.

Michael J. Long, for Massachusetts Association of School Superintendents, Inc., amicus curiae, submitted a brief.

Judith S. Yogman & E. Michael Sloman, Assistant Attorneys General, for the Attorney General, amicus curiae, submitted a brief.

NOLAN, J. The plaintiff, William J. Martin, was suspended from his teaching position in the Natick public schools on two separate occasions during the 1979-1980 school year. The superintendent of schools for Natick (superintendent) notified Martin of the first suspension, which covered a five-day period. After a hearing, the school committee of Natick (committee) voted to suspend Martin for an additional thirty days. Martin subsequently filed suit against the members of the committee and the superintendent in the Superior Court. He sought declaratory relief with respect to both suspensions, alleging that the defendants had imposed the suspensions in violation of G. L. c. 71, § 42D, and that he had been deprived of due process. The superintendent and the committee moved for summary judgment. After a hearing, the Superior Court judge ruled in favor of the defendants with respect to the thirty-day suspension, ruling that the statutory procedural requirements had been satisfied and that evidence supported the committee's decision. With respect to the five-day suspension, however, the judge

ruled in favor of the plaintiff.[2] The judge held unconstitutional the provisions of G. L. c. 71, § 42D, which permit certain school officials to suspend a teacher for up to five days without complying with the procedures mandated for longer suspensions.[3] The defendants' motion for reconsideration was denied, and final judgment was entered. Each party appealed and we granted the defendants' application for direct appellate review. G. L. c. 211A, § 10 (A).

On appeal, the defendants contend that the judge erred in declaring unconstitutional that part of G. L. c. 71, § 42D, which permits a superintendent to suspend a teacher for not more than five days. On cross-appeal, the plaintiff argues that the judge erred in ruling that the thirty-day suspension was imposed in accordance with the requirements of G. L. c. 71, § 42D, and of due process. We conclude that the judge correctly ruled that the thirty-day suspension was valid, but erred in ruling that the portion of the statute concerning a suspension for five days or less is unconstitutional.

The relevant facts may be summarized as taken from the judge's rulings, orders, and memorandum. Martin, accompanied by counsel, met with the superintendent on January 18, 1980. The superintendent informed Martin that he would not be teaching that day, and requested Martin's resignation. On January 21, 1980, the superintendent again met with Martin and his attorney. At this meeting, the superintendent told Martin that he had been suspended for five days. On the same day, the superintendent sent Martin a letter notifying him of the five-day suspension. Martin requested a hearing on this suspen-

[2] The judge used the procedural format of an order for partial summary judgment for the defendants regarding the thirty-day suspension, and partial summary judgment for the plaintiff as to the five-day suspension. See Mass. R. Civ. P. 56, 365 Mass. 824 (1974).

[3] The relevant portion of G. L. c. 71, § 42D, as amended through St. 1975, c. 316, provides: "The school committee, a superintendent or any other school official designated for the purpose, by the superintendent, may, notwithstanding any provision of this section to the contrary, suspend for a period of not more than five days a teacher for unbecoming conduct or for any other cause which such committee, superintendent or official deems adequate."

sion. In a second letter dated January 21, 1980, the superintendent notified Martin that the committee intended to vote on his suspension "for unbecoming conduct or other good cause" at its meeting scheduled for January 29, 1980, at 7:30 P.M. Martin's attorney wrote to the committee, seeking details of its claims against Martin.

On January 24, 1980, the superintendent wrote to Martin and his counsel, informing Martin that at its January 29 meeting the committee intended to vote on "whether to suspend" him. This letter delineated the allegations against Martin: that Martin had deliberately graded students lower than their school performances warranted after the first school term in order to motivate them, and that evaluations of Martin's teaching during the 1977-1978, 1978-1979, and 1979-1980 school years reflected his inefficiency and incapacity as a teacher. Martin's counsel wrote to the superintendent and the committee on January 25, 1980, asking whether the committee was considering a second suspension, and seeking information about the hearing format and the evidence against Martin. On the same day, the superintendent informed Martin's attorney that Martin would be on "paid leave of absence" for January 28 and 29, 1980.

The committee hearing began at 8 P.M. on January 29. The committee heard testimony and admitted in evidence exhibits concerning the allegations against Martin, then adjourned at 11:45 P.M. The hearing resumed on the next evening at 7:10 P.M. At approximately 1 A.M. the plaintiff's counsel informed the chairman that he was too tired to continue. The committee voted to go on with the hearing. Martin and his counsel left the meeting at 1:03 A.M. The committee then examined another witness and reexamined the superintendent. Counsel for the committee made a closing statement. After voting that each charge against Martin had been substantiated, the committee voted to suspend Martin through February 29, 1980, pursuant to G. L. c. 71, § 42D.

1. *The Five-Day Suspension.*

The defendants argue that the judge erroneously ruled that the last paragraph of G. L. c. 71, § 42D, which permits summary suspension of a teacher for not more than five days, is

unconstitutional. They contend that Martin did not have a recognizable property interest with respect to the five-day period of his suspension under this portion of § 42D. We agree that no property interest was implicated, and rule that this portion of G. L. c. 71, § 42D, is constitutional as applied in this case.

The nature of Martin's rights under State law governs our inquiry into the existence of a constitutionally protected property interest. *Milne* v. *School Comm. of Manchester*, 381 Mass. 581, 583 (1980), citing *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976). It is without dispute that Martin was a tenured teacher. He was, therefore, entitled to the protection that State law affords to those who have attained that status. See generally G. L. c. 71, §§ 41 and 42. Section 42D clearly provides that a teacher may be suspended for up to five days by "[t]he school committee, a superintendent or any other school official designated for the purpose, by the superintendent . . . for unbecoming conduct or for any other cause which such committee, superintendent or official deems adequate." The statute specifically distinguishes the short term suspension from one for which a teacher must be given prior notice and an opportunity to be heard.[4] Questions implicating the adequacy of reasons and the need for disclosure of those reasons under this portion of § 42D must await another day because, in the instant case, Martin was given a hearing after his five-day suspension. The reasons for the thirty-day suspension are a matter of record and there is nothing in the record to indicate that the reasons for the five-day suspension were any different.

Martin claims that his status as a tenured teacher establishes a property interest "in continued employment, safeguarded by due process" and that due process must be provided with respect to any suspension or dismissal. In *Milne* v. *School Comm. of Manchester, supra*, the plaintiff argued that his status as a tenured teacher gave him a property interest in continued em-

[4]The short, summary suspension is permissible "notwithstanding any provision of [§ 42D] to the contrary." G. L. c. 71, § 42D (describing notice and hearing requirements relative to suspension of tenured teacher for "unbecoming conduct or other good cause" for a period not to exceed one month).

ployment and that he was entitled to notice and a hearing before his employment was terminated due to declining enrollment. *Id.* at 582-583. We held that the plaintiff had no legitimate claim of entitlement to continued employment in that case because the applicable statute set forth the right of a school committee to dismiss a tenured teacher due to a decrease in enrollment. *Id.* at 583. In *Boston Teachers Union, Local 66* v. *School Comm. of Boston*, 386 Mass. 197 (1982), we relied upon *Milne* in deciding that § 42 does not require that a tenured teacher be given notice and a hearing when that teacher is dismissed due to budgetary considerations. We conclude that Martin had no statutory right or legitimate claim of entitlement to continued employment which made him immune from the type of short term suspension described in § 42D.[5] Therefore, we reverse the judge's ruling that that portion of § 42D is unconstitutional and declare it constitutional as applied in this case.

2. *The Thirty-Day Suspension.*

Martin argues that he did not receive proper notice concerning the proposed thirty-day suspension, and that the committee's refusal to adjourn the hearing upon his request was arbitrary and capricious and deprived him of his due process rights. He also contends that the thirty-day suspension was improper

[5]Martin has attempted to distinguish our decision in the *Milne* case, contending that his rights as a tenured teacher were originally established as set forth in St. 1914, c. 714, § 5. He reasons that because this statute permitted dismissals due to declining enrollment without a hearing, the *Milne* court was not required to decide whether the Legislature could limit tenure rights after their original grant. Martin notes that the original tenure statute permitted suspension only for "unbecoming conduct and immoral acts," and concludes that the Legislature's modification of this statute to include the five-day suspension possible under § 42D was unconstitutional. Martin cites *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), to support this argument, but his reliance upon *Logan* is misplaced. The *Logan* Court stated that a State may not "constitutionally authorize the deprivation of [a property interest], once conferred, without appropriate procedural safeguards." *Id.* at 432, quoting *Vitek* v. *Jones*, 445 U.S. 480, 490 n.6 (1980). The Court recognized, however, that a State remains free to alter or to terminate a previously created property right. *Logan* v. *Zimmerman Brush Co.*, *supra* at 432. "In each case, the legislative determination provides all the process that is due . . . ." *Id.* at 433.

because the evidence presented to the committee did not substantiate the charges against him. We conclude that the committee imposed the suspension in accordance with both the statutory procedures and the requirements of due process. Furthermore, the record supports a finding that the charges were substantiated.

Section 42D provides that a tenured teacher "shall not be suspended, under the provision of this paragraph, except for unbecoming conduct or other good cause, nor unless at least seven days exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote . . . nor unless the charges have been substantiated." The judge expressly ruled, as a matter of law, that Martin received proper notice of the committee's intention to vote on whether he should receive an *additional* suspension. We find no error in this ruling. Martin's claim that he should have been informed of the length of an additional suspension is meritless. The statute does not require the committee to decide on the length of a suspension prior to hearing evidence of the charges against a teacher. It would offend logic to require the committee to make this decision prior to consideration of relevant evidence and to limit unnecessarily the committee's actions at such a hearing to voting on suspension for a predetermined number of days.

With respect to the committee's refusal to grant a continuance on the second night of its hearing, we find no error in the judge's ruling that this decision was not arbitrary or capricious. The question of a continuance is addressed to the discretion of the tribunal. There was no abuse of discretion here. See *Daley* v. *District Court of W. Hampden*, 304 Mass. 86, 95 (1939).

Martin states that the judge reviewed evidence that had not been presented to the committee at the hearing. He asserts that the judge could not properly have ruled that the charges were substantiated. We do not determine the issues which bear on the evidence because we do not have a transcript of the hearing before the school committee except for a few unhelpful excerpts in the appendix. See Mass. R. A. P. 8 (b) (1), as amended,

378 Mass. 932 (1979). Apparently, the judge had the benefit of a transcript, and he concluded that there was sufficient evidence to support the thirty-day suspension. We shall not disturb this conclusion.

"[T]he authority of a school committee to manage the public schools is to be broadly interpreted." *O'Donnell* v. *Norwood*, 346 Mass. 394, 396-397 (1963). Martin's thirty-day suspension did not rest on a basis which was "arbitrary, irrational, unreasonable, in bad faith, or irrelevant to the committee's task of running a sound school system." *Springgate* v. *School Comm. of Mattapoisett*, 11 Mass. App. Ct. 304, 308 (1981).

The judgment of the Superior Court is reversed in so far as it was granted in favor of the plaintiff with respect to the five-day suspension. Judgment for the defendants is to be entered. The judgment in favor of the defendants with respect to the thirty-day suspension is affirmed.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

SUPERIOR COURT
CIVIL ACTION
NO. 80-1075

WILLIAM J. MARTIN,
Plaintiff
v.
DIGHT W. CRAIN, et al.,
Defendants

RULINGS, ORDERS AND MEMORANDUM OF DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Statement of the Case

Plaintiff William J. Martin is a school teacher claiming that defendant Natick School Committee wrongly suspended him from employment for two consecutive periods during January and February, 1980. Plaintiff seeks a declaratory judgment to the effect that he was denied proper notice and hearing in accordance with G.L. c. 71, § 42D, which governs suspension of public school teachers. Defendant School Committee has moved for summary judgment on the ground that there exists no genuine dispute as to any material facts relevant to its compliance with G.L. c. 71, § 42D.

Facts

The submissions of the parties, including affidavits, set out the following uncontroverted facts relevant and material to Defendants' Motion. On January 18, 1980, plaintiff, accompanied by counsel, met with Natick School Superintendent

Keefe. Keefe informed plaintiff that he, plaintiff, would not be teaching that day and requested that plaintiff resign his teaching position [Martin affidavit, par. 10; Keough affidavit, par. 3]. On January 21, 1980, plaintiff, again accompanied by counsel, was informed by Keefe that he had been suspended for five days. Plaintiff received a letter to that effect on the same day. [Wright affidavit, par. 3; Martin affidavit, par. 13; Exhibit "1" attached to plaintiff's Memorandum in Opposition to the Defendants' Motion for Summary Judgment]. Plaintiff then requested a hearing on the five day suspension [Martin affidavit, par. 14; Wright affidavit, par. 4]. On January 21, 1980, Keefe informed plaintiff in a letter that "Pursuant to . . . General Law chapter 71, section 42D, and in my capacity as Superintendent of Schools, I hereby notify you that at its meeting scheduled for 7:30 p.m . . . the School Committee intends to vote on your suspension for unbecoming conduct or other good cause." [Exhibit "2" attached to plaintiff's Memorandum]. Plaintiff's counsel interpreted this letter to mean that a hearing on the five-day suspension had been scheduled for January 29. [Wright affidavit, par. 4].

On January 21, 1980, plaintiff's counsel wrote to the School Committee requesting details concerning its claims against plaintiff. [Exhibit "A" attached to Keough affidavit]. On January 24, 1980, Keefe informed plaintiff and plaintiff's counsel in writing that,

> ". . . I hereby notify you that at its meeting on January 29, 1980, the School Committee intends to vote on whether to suspend you for unbecoming conduct and/or other good cause. More specifically, the Committee intends to vote on *whether to suspend* you for alleged: 1) Deliberately grading your students lower for the grades which were given for the first term in order to "motivate" the class to work harder; 2) Inefficiency in your teaching

> reflected in evaluations conducted during the 1977-78, 1978-79 and 1979-80 school years . . . 3) Incapacity as a teacher as reflected in evaluations conducted in 1977-78, 1978-79 and 1979-80. . . . With respect to Mr. Keough's letter on January 21, 1980 concerning whether the meeting will be in open session, please be advised that, pursuant to . . . General Laws chapter 71, section 2D, the Committee will decide in its discretion whether the meeting is either public or private. Finally, please be advised that . . . chapter 71, section 42D requires a hearing only if so requested." [Exhibit "B" attached to Keough affidavit. Emphasis added].

Plaintiff's counsel interpreted the January 24, 1980 letter to be a communication of reasons why plaintiff had been suspended for five days [Keough affidavit, par. 6].

On January 25, 1980, plaintiff's counsel wrote to the School Committee and to Dr. Keefe requesting that the School Committee advise him as to whether it was considering a second suspension of plaintiff; what would be the hearing format; and, in addition, requested opportunity to examine all evidence to be offered at the hearing against plaintiff [Exhibit "C" attached to Keough affidavit]. Plaintiff's counsel requested Keefe to inform him of the source of the accusations set out in the January 24, 1980, letter and of plaintiff's employment status as of January 28, 1980 [Exhibit "D" attached to Keough affidavit]. On January 25, 1980, Keefe informed plaintiff's counsel that plaintiff would be on "paid leave of absence" for January 28 and 29, 1980 [Exhibit "E" attached to Keough affidavit].

On January 29, 1980, the School Committee conducted a hearing between 8:00 p.m. and 11:45 p.m. concerning the proposed plaintiff's suspension. [Hearing transcript, herein "T.", cover page, 130]. Witnesses called on behalf of the school

committee were examined under oath and then cross-examined by plaintiff's counsel. Exhibits were also introduced into evidence.

On January 30 the hearing resumed at 7:10 p.m. and continued at 1:40 a.m. on January 31 [January 30-31 "T.", cover page, 353]. Additional exhibits were introduced at that continued hearing. Three witnesses testified on behalf of the School Committee, one of whom was cross-examined by plaintiff's counsel ["T." 133]. At approximately 1:00 a.m. on January 31, 1980, plaintiff's counsel stated to the School Committee:

> "I am too tired, sir, for the record, too tired to go beyond one o'clock. Not effective in representing my client because of fatigue. If the Chairman wishes to adjourn the hearing, that is his prerogative; if he wishes to continue in my absence — I am going to advise my client not to continue with the hearing without counsel." ["T." 331].

The Chairman of the School Committee then asked whether the Committee desired to continue the hearing or to adjourn. The Committee voted unanimously to continue the hearing, ["T." 331-332], and at 1:03 a.m. plaintiff and his counsel left. ["T." 332]. After counsel and plaintiff's departure, counsel for the School Committee examined another witness, re-examined Keefe who had testified previously and then made a closing statement. ["T." 332-338]. The Committee then voted that each claim against plaintiff had been substantiated and next voted to suspend plaintiff through February 29, 1980, for "unbecoming conduct" and "other good cause" within the meaning of G.L. c. 71, § 42D. ["T." 344-350].

Rulings and Memorandum of Decision

The issues raised by defendant's Motion include whether there is a genuine issue of material fact as to whether the School Committee complied with the statutory seven-day notice which must precede a vote to suspend a teacher for more than five days; whether the Fourteenth Amendment of the United States Constitution invalidates the second paragraph of G.L. c. 71, § 42D, which provides that a tenured teacher may be suspended for five days without pay involuntarily and without a hearing at the discretion of a school officer; whether a teacher may be placed involuntarily on a paid leave of absence pursuant to G.L. c. 71, § 41A; whether when a school committee votes to continue a suspension hearing at 1:00 a.m. over the objection of fatigued counsel, and when counsel leaves the hearing with his client prior to the hearing's conclusion, does that vote amount to arbitrary and capricious action so as to deprive plaintiff of a fair hearing; and does the record in the case substantiate the School Committee's allegations against plaintiff?

In my opinion, in sum, the defendant School Committee satisfied, as a matter of law, the seven-day notice requirement preceding its vote to suspend plaintiff for thirty days. Further, I rule that the second paragraph of c. 71, § 42D, does violate the due process clause of the Fourteenth Amendment and is invalid; and thus, plaintiff, as a tenured state employee, was therefore deprived of a property right without due process of law. I also rule that plaintiff was placed on involuntary paid leave of absence in contravention of G. L. c. 71, § 41A. Next, I rule that the School Committee's vote to continue the May 29th suspension hearing at 1:00 a.m. was not arbitrary or capricious and plaintiff was not prejudiced thereby. Finally, I rule that the record in this action is sufficient to substantiate plaintiff's suspension for thirty days.

General Laws c. 71, § 42D, provides procedural rights for tenured teachers as follows:

> In every such town, a teacher employed at discretion under section forty-one . . . shall not be suspended, under the provisions of this paragraph, except for unbecoming conduct or other good cause, nor unless at least seven days exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so requests, he shall have been furnished by the committee with a written charge or charges of the cause or causes for which the suspension is proposed; nor unless, if he so requests, he has been given a hearing before the school committee which may be either public or private at the discretion of the school committee and at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and to examine them and to cross-examine other witnesses; nor unless the charge or charges have been substantiated; nor unless, in the case of a teacher, the Superintendent shall have given the committee his recommendations thereon. No teacher . . . shall be suspended for a period exceeding one month, nor shall such teacher . . . receive compensation for any period of unlawful suspension. . . .

General Laws c. 71, § 42D.

The second paragraph of c. 71, § 42D, empowers school officials to suspend tenured teachers for up to five days for any cause which the official deems adequate.

> The school committee, a superintendent or any other school official designated for the purpose, by the superintendent, may, notwithstanding any provision of this sec-

> tion to the contrary, suspend for a period of not more than five days a teacher for unbecoming conduct or for any other cause which such committee, superintendent, or official deems inadequate.

Id.

The Notice Issue

It is undisputed that on January 21, 1980, plaintiff received notice of a January 29, 1980 School Committee vote "[p]ursuant to the provisions of General Law chapter 71, Section 42D . . . [concerning plaintiff's] suspension for unbecoming conduct/or other good cause." [Exhibit "2" attached to plaintiff's Memorandum]. Counsel's assertion that the January 21, 1980 notice should have stated that the Committee intended to vote a thirty-day suspension in order to satisfy the statutory notice requirement is not well taken. The statute specifically contemplates suspensions lasting less than the maximum thirty days. "No teacher . . . shall be suspended *for a period exceeding one month* . . ." Id. [Emphasis added]. It would be illogical to require a school committee to predetermine the intended suspension period prior to hearing and vote on the matter.

Likewise, counsel's apparent confusion as to whether or not the January 21, 1980 notice letter applied to a hearing on the previous five-day suspension does not invalidate the notice. The January 21, 1980 letter cited c. 71, § 42D, specifically and referred to "your suspension for unbecoming conduct/or other good cause." Review of c. 71, § 42D, makes it clear that the notice and good cause requirements refer exclusively to suspensions exceeding five days. Plaintiff, as a matter of law, had notice as of January 21, 1980 that the School Committee intended to vote on his additional suspension on January 29, 1980.

The Constitutional Issue

The second paragraph of c. 71, § 42D, provides that a tenured teacher may be suspended summarily for five days without pay and without a hearing at the discretion of the appropriate school official. *Id.* See also Acts of 1968 and 1975, chapters 156 and 316 respectively, which amended the second paragraph. Chapter 156 was entitled "An Act Decreasing The Period For Which A Teacher May Be Suspended *Without A Hearing*." Chapter 316 was "An Act Limiting The *Summary Suspension* of Public School Teachers." [Emphasis added].

Defendant does not dispute that plaintiff is a tenured teacher employed with the Natick School System since 1959. [Complaint, par. 1]. It is undisputed that plaintiff requested a hearing concerning his five-day suspension. [Answer of Defendants, par. 7; Plaintiff Exhibit "C" attached to Keough affidavit; T-16 lines 6-12]. Defendant does not assert that plaintiff ever received a hearing on the five-day suspension, and it is clear he did not.

The issue is whether the School Committee acted constitutionally in summarily suspending a plaintiff for five days without a hearing pursuant to the second paragraph of chapter 71, section 42D. This court rules that the second paragraph is unconstitutional to the extent that it empowers school officials to suspend tenured teachers without notice or a post-suspension hearing.

In *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), the United States Supreme Court debated the issue as to the source of procedural rights accorded to federal workers who, by statute, enjoyed a property interest in their jobs. In that case, plaintiff was a non-probationary federal employee who challenged as unconstitutional a federal statute and regulations permitting his termination prior to any hearing. The regulations allowed

for a post-termination hearing with a right of appeal. *Id.* at 143-146. The Court upheld the post-termination hearing procedure but was divided as to whether the post-termination regulations were constitutional. Justice Rehnquist wrote a plurality opinion joined by the Chief Justice and Justice Stewart in which he theorized that the statute which creates tenure and thus a property interest on behalf of the employee governs also the process due the employee when that interest is taken away.

> Here appellee did have a statutory expectancy that he not be removed other than for 'such cause as will promote the efficiency of [the] service'. But the very section of the statute which granted him that right . . . expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution.
>
> [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet.

Id. at 151-154. The Rehnquist analysis would uphold the five-day discretionary suspension without a hearing, because it is "inextricably intertwined" with the grant of the substantive right confining suspensions exceeding five days to a good cause standard.

The majority of the Justices disagreed, however, that a procedural statute conferring job tenure is determinative also of what process is due. The majority followed the principle that the Constitution is the source of procedural rights. Justices Powell and Blackmun concurred with the plurality, but only

because they found that the statute granting post-termination procedural rights survived constitutional scrutiny. Once a property right to job security was established, the Constitution determines what process is due.

> The plurality opinion evidently reasons that the nature of appellee's interest in continued federal employment is necessarily defined and limited by the statutory procedures for discharge and that the constitutional guarantee of procedural due process accords to appellee no procedural protections against arbitrary or erroneous discharge other than those expressly provided in the statute. The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of the procedural protections to which he may lay claim. . . . This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee.

Id. at 166-167.

Justice White wrote in dissent that, "The rationale of [the plurality] position quickly leads to the conclusion that even though the statute requires cause for discharge, the requisites of due process could equally have been satisfied had the law dispense with any hearing at all. . . ." *Id.* at 177-178. Justices Brennan and Douglas joined Justice Marshall in dissent who wrote:

> [A]lthough appellee's property interest arose from statute, the deprivation of his claim of entitlement to continued employment would have to meet minimum standards of procedural due process regardless of the discharge procedures provided by the statute. Accordingly, a major-

> ity of the court rejects Mr. Justice Rehnquist's argument that because appellee's entitlement arose from statute, it would be conditioned on a statutory limitation of procedural due process protection.

Id. at 211.

The second paragraph of chapter 71, section 42D, therefore cannot be deemed constitutionally adequate merely because it is coupled with procedural rights in the first paragraph. A court must look to the federal constitution to determine whether a tenured public school teacher may be suspended summarily for five days without pay and without a hearing.

Applicable cases provide the rule that procedural due process requires a minimum a post-deprivation hearing where government suspends temporarily a vested interest. In *Goss* v. *Lopez*, 419 U.S. 565 (1975), the United States Supreme Court declared unconstitutional a statute permitting summary suspension of students without some form of post-suspension hearing.

> We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency. Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.
>
> We agree with the District Court, however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a

> continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from the school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable. . . .
>
> The District Court found each of the suspensions involved here to have occurred without a hearing, either before or after the suspension, and that each suspension was, therefore, invalid and the statute unconstitutional insofar as it permits such suspensions without notice or hearing. Accordingly, the judgment is Affirmed.

Id. at 581-584.

In *Peacock* v. *Bd. of Regents of the Universities and State Colleges of Arizona*, 510 F.2d 1324 (9th Cir.) (1975), cert. den., 422 U.S. 1049 (1975), the Appeals Court upheld the suspension of a tenured university professor where the professor was accorded a post-suspension hearing. "Whatever damage appellant will suffer by a suspension is minimized by the requirement of a prompt post-suspension hearing, which limits the duration of the suspension and the extent of the damage he will suffer should the suspension later be found to have been unwarranted." *Id.* at 1329. In *O'Hara* v. *Commissioner of Public Safety*, 367 Mass. 376 (1975), the Supreme Judicial Court held that a state police officer's due process rights were not violated where his suspension was "followed by prompt notice and full hearing." *Id.* at 384. Compare *Wood* v. *Goodman*, 381 F.Supp. 413 (D. Mass. 1974) aff'd without op., 516 F.2d 894 (1st Cir. 1975), where the court declined to rule on the constitutionality of the second paragraph of G.L. c. 71, § 42D, because the plaintiff school teacher had received a hearing prior to his seven-day suspension then prescribed by the paragraph.

> Since the procedural safeguards accorded the plaintiff in this case met all the requirements of due process, it is unnecessary to enter a declaration, as requested by the plaintiff, concerning whether a suspension under the second paragraph of M.G.L. c. 71, § 42D, may, consistently with due process, occur without the procedural safeguards given the plaintiff in this case.

Id. at 420.

This court rules in sum that the January 21-25, 1980 suspension of plaintiff was invalid because it lacked the minimum procedural safeguards required by the federal constitution and that the second paragraph of c. 71, § 42D, to the extent that it allows five-day suspensions of tenured teachers without a prompt post-suspension hearing, is unconstitutional.

Proper Remedy is Five Days Back Pay

An order requiring a hearing regarding the five-day suspension would not satisfy plaintiff's constitutional right to prompt post-suspension hearing. See, e.g., *Brown* v. *Bathke*, 566 F.2d 588 (8th Cir. 1977) (high school probationary teacher's right to due process not adequately protected by post-terminated hearing conducted some two years after her termination). The proper remedy, therefore, is back pay for the five days plaintiff was wrongfully suspended. *Johnson* v. *San Jacinto Junior College*, 498 F.Supp. 555, 571 (S.D. Tex. 1980). "The back pay relief to which plaintiff is entitled for denial of procedural due process consists of lost wages including the value of any employment benefits lost as a result of the unlawful demotion; less any actual subsequent earnings of plaintiff in regular daytime employment during that period." Plaintiff should submit to this court and to defendant an affidavit setting out his lost wages/ benefits for the week of January 21-25, 1980 as well as

any alternative salary he may have received in accordance with the *Johnson* criteria. *Id.* Any dispute which may arise regarding plaintiff's salary/benefits claim for that week may be entertained in a motion to reconsider this specific order.

Paid Leave of Absence Improperly Imposed

The record reveals and defendants does not dispute its unilateral imposition upon plaintiff of a paid leave of absence on January 28 and 29. ["T." 81-82]. That action manifestly contravenes G.L. c. 71, § 42D, which provides in pertinent part:

> A school committee may grant a leave of absence for study or research to any teacher . . . serving at discretion which would increase his professional ability . . . provided, that prior to the granting of such level he shall enter into a written agreement with the school committee.

G.L. c. 71, § 41A.

This court finds the involuntary imposition of paid leave of absence to be unlawful. Plaintiff alleges no damages, however, as a result of that imposition, and therefore none are granted.

Thirty-Day Suspension Hearing Complied With First Paragraph of G.L. c. 71, § 42D; The Hearing Satisfied Due Process; and The School Committee Did Not Act in An Arbitrary or Unreasonable Manner.

The hearing transcript reveals that plaintiff, through counsel, had ample opportunity to present evidence, and to examine and cross-examine witnesses, in compliance with the first paragraph of c. 71, § 42D. That paragraph, moreover, is constitutional because it provides for notice and a hearing *prior* to

suspension. Cf. *Goss, Goodman, O'Hara, Peacock, supra.* The School Committee did not act in an unreasonable or capricious manner in continuing the January 30-31 hearing over plaintiff counsel's objections. See *Wood* at 418 (par. 27), "Plaintiff and his attorney left the May 7, 1970 meeting before adjournment." See also *White* v. *S. Park Independent School District,* 693 F.2d 1163 (5th Cir. 1982) (No violation of due process in refusing to grant second continuances of termination hearing and in deciding to proceed in teacher's absence).

Record Provides Ample Evidence to Substantiate Thirty-Day Suspension

This court finds sufficient grounds in the hearing transcript upon which the school committee could lawfully suspend plaintiff for thirty days. This court is guided by definition of "good cause" found in Massachusetts cases dealing with teacher terminations under G.L. c. 71, § 42. "The term 'good cause' has been held to include 'any ground which is put forward by the committee in good faith and which is not arbitrary, irrational, unreasonable or irrelevant to the committee's task of building up and maintaining an efficient school system'" *Nutter* v. *School Committee of Lowell,* 1977 Mass. App. Ct. 77, 81; *Lower* v. *North Middlesex Regional School Committee,* 1979 Mass. App. Ct. 536, 539. In so holding, this court notes hearing testimony regarding parental concern with plaintiff's classroom learning environment ["T." 36-38, 189-190] disciplinary problems and lack of challenge in the classroom ["T." 38, 105, 140, 142]; lack of formal assessment of student progress ["T." 107, 108]; inadequate lesson plans ["T." 158]; and deliberate lowering of academic grades in order to motivate pupils ("T." 196, 197, 198, 202, 274] as among the evidence sufficient to substantiate the school committee's decision.

Orders for Judgment

Partial summary judgment is allowed defendant to the extent that it acted lawfully regarding the thirty-day suspension of defendant. Partial summary judgment is allowed plaintiff to the extent that he was suspended wrongfully from January 21 through January 25, 1980. The parties may submit affidavits to this court regarding damages in accordance with this decision.

/s/ _____
Paul G. Garrity
Justice of the Superior Court

Entered: June 12, 1983

COMMONWEALTH OF MASSACHUSETTS
SCHOOL COMMITTEE HEARING
NATICK, MASSACHUSETTS

PRESENT:

DIGHT W. CRAIN, CHAIRMAN
PETER H. GARLAND
J. VINCENT SAUNDERS
MARSHALL LEBOWITZ
MARK H. RAIDER
PAUL AMBLER
PAMELA J. KAUFMANN

ALSO PRESENT:

JOSEPH A. KEEFE, SUPERINTENDENT
FRANCIS CORCORAN, ASST. SUPERINTENDENT FOR PERSONNEL

WILLIAM MARTIN, TEACHER

APPEARANCES:

Atty. Phillips Axten (Nutter, McClennen & Fish) 600 Atlantic Avenue, Boston, Massachusetts 02210, appearing for the Superintendent

Atty. William Wright, Atty. Joseph Papetti and Atty. Paul J. Keough, 5 Main Street, Natick, Massachusetts, appearing for William Martin

Town Hall
Natick, Massachusetts
January 29, 1980
8:00 p.m.

A TRUE COPY
ATTEST: /s/ _____ March 5, 1985
Frederick J. Quinlan, Asst. Clerk
Supreme Judicial Court for the Commonwealth

. . . . . .

I think it is important to emphasize that under the second paragraph, Chapter 71, Section 42D, a Superintendent may, notwithstanding any provision of this section to the contrary, suspend for a period of not more than five days a teacher for unbecoming conduct or for any other cause which such Superintendent deems adequate.

As a result, Mr. Chairman, I would suggest that the statute, itself, is very clear, made even clearer by communications from the Superintendent of Schools that the meeting tonight was for the intention of voting on whether to suspend Mr. Martin henceforth. It does not have any reference, in and of itself, to any action that the Superintendent has taken up to this point in time. As a result, Mr. Chairman, I would appreciate the opportunity, when the School Committee is ready, to proceed with my first witness.

CHAIRMAN CRAIN: Mr. Wright, the School Committee has followed Chapter 71, Section 42D to the point of and including this hearing by law, and Mr. Axten will present witnesses to substantiate the charges, after which each witness you . . . .

. . . . . .

MR. WRIGHT: That, Mr. Crain, is what I am questioning, and it appears obvious to me, but maybe not to you or to the people here, there is one question that is asked there. Are we going to receive a hearing on the five-day suspension previously imposed? Is your answer to that question no?

CHAIRMAN CRAIN: Not tonight.

MR. WRIGHT: Well, then, if so when?

CHAIRMAN CRAIN: That will be determined by the School Committee at a later date.

MR. WRIGHT: Let the record indicate my objection. Notification given January 21, 1980, referred to the charges contained in the letter which accompanied a five-day suspension. The notification of this meeting to consider a second suspension was not given until the 24th, and the statute that you have just said you are following requires, sir, a seven-day notification as to that suspension.

CHAIRMAN CRAIN: That notice was hand-delivered on January 21.

MR. WRIGHT: Question as to law and a question as to which notice you refer to.

§ 42. Dismissal of teachers and superintendents

The school committee may dismiss any teacher, but no teacher and no superintendent, other than a union superintendent and the superintendent of schools in the city of Boston, shall be dismissed unless by a two thirds vote of the whole committee. A teacher not employed at discretion under the preceding section and who has been teaching for more than ninety days shall not be dismissed for any reason unless at least fifteen days, exclusive of customary vacation periods, prior to the meetings at which the vote is to be taken, he shall have been notified of such intended vote and, if he so requests, he shall have been furnished by the committee with a written statement of the cause or causes for which the dismissal is proposed and if he so requests, he has been given a hearing before the school committee at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and examine them, and the superintendent shall have given the committee his recommendation thereon. In every such town a teacher or superintendent employed at discretion under section forty-one or a superintendent employed under a contract, for the duration of his contract, shall not be dismissed, except for inefficiency, incapacity, conduct unbecoming a teacher or superintendent, insubordination or other good cause, nor unless at least thirty days, exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so requests, he shall have been furnished by the committee with a written charge or charges of the cause or causes for which his dismissal is proposed; nor unless, if he so requests, he has been given a hearing before the school committee which may be either public or private at the discretion of the school committee and at which he may be represented by counsel, present evidence and call witnesses to testify in his

behalf and examine them; nor unless the charge or charges shall have been substantiated; nor unless, in the case of a teacher, the superintendent shall have given the committee his recommendations thereon. The change of marital status of a female teacher or superintendent shall not be considered cause for dismissal under this section. Neither this nor the preceding section shall affect the right of a committee to dismiss a teacher whenever an actual decrease in the number of pupils in the schools of the town renders such action advisable. In case a decrease in the number of pupils in the schools of a town renders advisable the dismissal of one or more teachers, a teacher who is serving at the discretion of a school committee under section forty-one shall not be dismissed if there is a teacher not serving at discretion whose position the teacher serving at discretion is qualified to fill. No teacher or superintendent who has been lawfully dismissed shall receive compensation for services rendered thereafter.

§ 42D. Suspension of teachers and superintendents

The school committee may suspend any teacher, but no teacher shall be suspended for more than ten days and no superintendent, other than a union superintendent of schools in the city of Boston, shall be suspended, unless by a two thirds vote of the whole committee. In every such town a teacher or superintendent employed at discretion under section forty-one or a superintendent employed under a contract, for the duration of his contract, shall not be suspended, under the provisions of this paragraph, except for unbecoming conduct or other good cause, nor unless at least seven days exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so requests, he shall have been furnished by the committee with a written charge or charges of the cause or causes for which the suspension is proposed; nor unless, if he so requests, he has been given a hearing before the school committee which may be either public or private at the discretion of the school committee and at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and to examine them and to cross-examine other witnesses; nor unless the charge or charges shall have been substantiated; nor unless, in the case of a teacher, the superintendent shall have given the committee his recommendations thereon. No teacher or superintendent shall be suspended for a period exceeding one month, nor shall such teacher or superintendent receive compensation for any period of lawful suspension. No teacher or superintendent shall be interrogated prior to any notice given to him relative to a hearing on suspension unless he is notified of his right to be represented by counsel during any such investigation.

The school committee, a superintendent or any other school official designated for the purpose, by the superintendent, may,

notwithstanding any provision of this section to the contrary, suspend for a period of not more than five days a teacher for unbecoming conduct or for any other cause which such committee, superintendent or official deems adequate.

§ 43A. Appeal by teachers and certain supervisory personnel from dismissal, demotion or removal; determination and disposition; decision final

Any teacher or principal or superintendent of schools employed at discretion or any superintendent employed under a contract, for the duration of his contract, or any principal or supervisor, who had been dismissed, demoted, or removed from a position by vote of a school committee under the provisions of section forty-two, section forty-two A or section sixty-three may, within thirty days after such vote appeal therefrom to the superior court in the county in which the person was or is employed.

The court shall advance the appeal for a speedy hearing and, after such notice to the parties as it deems reasonable, it shall hear the cause de novo, review such action, and determine whether or not upon all the evidence such action was justifiable. If the court finds such action was justifiable, the action of the school committee shall be affirmed; otherwise, it shall be reversed and the appellant shall be reinstated to the position without loss of compensation. The decision of the court shall be final, except as to matters of law.